

Provisional Double Patenting

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting over claim 1 of seven other copending applications, namely: serial number 08/593,794 (hereinafter the '794 Application); serial number 08/593,795 (hereinafter the '795 Application); serial number 08/593,797 (hereinafter the '797 Application); serial number 08/593,798 (hereinafter the '798 Application); serial number 08/593,800 (hereinafter the '800 Application); serial number 08/593,862 (hereinafter the '862 Application); and serial number 08/594,271 (hereinafter the '271 Application).

The provisional rejections are predicated on physical differences between claimed inventions that are asserted to not be patentably distinct, as follows:

- a. '794 Application. Handles recited in claim 1 of the '794 Application are asserted to be conventional in the art.
- b. '795 Application. The cover recited in claim 1 of the '795 Application is asserted to be conventional in the art.
- c. '797 Application. The support structure of the present application is asserted to read on the freestanding housing of claim 1 of the '797 Application.
- d. '798 Application. Inclination structure of claim 1 of the '798 Application is asserted to be conventional in the art.
- e. '800 Application. The support structure of claim 1 of the present application is asserted to read on the freestanding housing of claim 1 of the '800 Application.
- f. '862 Application. Inclination structure of claim 1 of the '862 Application is asserted to be conventional in the art.
- g. '271 Application. Rollers of claim 1 of the '271 Application are asserted to be conventional in the art.

1. Policy Behind Rejection Does Not Apply

The provisional rejection is based on the judicially created doctrine of double patenting. Applicants now assert that the basis for obviousness-type double patenting under the judicially created doctrine is no longer extant. As stated in In Re Longi, 225 U.S.P.Q. 645, 648 (Fed. Cir. 1985), "(a) double patenting rejection precludes one person from obtaining more than one valid patent for either (a) the 'same invention' or (b) an 'obvious' modification of the same invention." A "same invention" rejection is based on 35 U.S.C.

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§ 101 and refers to IDENTICAL SUBJECT MATTER. The "obviousness" type rejection is based on public policy as reflected in the patent statutes "to prevent the extension of the term of a patent." In Re Longi, supra.

The objective of the policy of the judicial doctrine is to ensure that the public is free to use an invention and obvious modifications or variants upon expiration of the first patent. In Re Zickendraht, 319 F.2d 225, 232, 138 U.S.P.Q. 23, 27 (CCPA 1963). Indeed, the only real objection to double patenting is the unwarranted extension of the patent monopoly. In Re Van Ornum and Stang, 214 U.S.P.Q. 761, 769 (CCPA, 1982) citing In Re Siu, 222 F.2d 267, 105 U.S.P.Q. 428 (CCPA, 1955). The focus of the obviousness type double patenting rejection is the prevention of an extension of the patent right beyond the statutory limits. In Re Goodman, 29 U.S.P.Q. 2011, 2015 (Fed.Cir. 1993); C.f., In Re Braithwaite, 154 U.S.P.Q. 29, 34 (CCPA 1967); In Re Sutherland, 146 U.S.P.Q. 485, 491 (CCPA 1965); in accord: MPEP § 804, part II. B. (at page 800-17).

Under the recently enacted changes to title 35 of the U.S. Code, the term of any patent to issue from the present application and any of the other applications cited as part of the rejection WILL BE IDENTICAL. 35 U.S.C. § 154 (a)(2) specifies that "such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States." (Emphasis added). In this case each of the applications cited were all filed on the same day this application was filed. Thus any patents that issue will not have different expiration dates. Absent different expiration dates, there is no way for applicants to extend the term. The inability to extend the patent term because it is now controlled by the filing date rather than the issue date was recognized by the PTO in a comments relating to certain new rule changes required because of the changes to the patent statutes regulating the term of patents. See: the OFFICIAL GAZETTE, May 2, 1995 at page 1174 OG 18, col. 2, 8-11 lines from the bottom. That is, in this case, all the applications have exactly the same filing date; and in turn all issuing patents must have the same expiration date should more than one patent issue.

In the case of Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5, 59 S.Ct. 675, 41 U.S.P.Q. 155 (1939), Shimadzu was the owner of two US Patents. The defendant in an infringement suit raised a number of defenses one of which was invalidity due to double patenting. The Supreme Court appears to have favorably quoted the trial court which had

held that no double patenting was involved because the two patents central to the question had issued on the same day. In turn it was clear that no extension of the patent monopoly was involved. The same issue is present here. There is no possible extension of the patent monopoly so double patenting cannot be a proper basis for the rejection. Thus the rejection is flatly opposite to the controlling authority of the Supreme Court.

MPEP § 804 states that the policy behind obviousness of double patenting is an unwarranted extension of the patent term. Since that cannot happen, the entire premise for provisional obviousness-type double patenting is no longer extant. In turn, the entire rejection is without factual or legal support. The rejection should be withdrawn.

2. Combination Claims Cannot be Rejected Over One Element.

In the case of In Re Schneller, 158 U.S.P.Q. 210, 215-216 (CCPA 1968), at issue was a potential double patenting between claims involving the same elements but for one. The court held that a "combination claim does not cover or read on a single element." By analogy the court further reasoned that a combination claim for invention ABCX is different from ABCY and variations thereof. 158 U.S.P.Q at 216. In other words a claim must be taken as a whole and evaluated without considering the specification of the other application as prior art because it is not prior art.

In this case, it appears that the double patenting rejection is premised not on the claim as a whole but rather on the basis it is only the added feature in the other cited cases that is to be considered. However, it is error, for example, to focus on the handles of the '794 application because the '794 application sets forth a novel combination and not just one element. And the issue then is whether there is double patenting if invention ABCX is in one case and invention ABC or ABCY is in another. Under Schneller, there is no double patenting when considering the whole claim.

In the case at hand, in view of identical filing dates and identical issue dates (should patents issue), the inventions will be combinations of elements each of which combinations are separately patentable. Therefore it is not proper to focus on one element and assert that obviousness precludes patenting under the double patenting doctrine. Rather the claims must be evaluated as a whole.

3. The Test Not Met.

MPEP § 804 Part II. B. 1. sets out a 4-point test to determine if double patenting may be asserted.

(1) The first element is to determine the scope and content of the patent claim at issue and the prior art relative to the claim of the application in issue .

In the context of this application, the inquiry would necessitate an evaluation of only the prior art because the other application(s) cannot be prior art no matter if and no matter when a patent issues on the other application(s), if ever. Thus the combination claim of the '794 application (for example) must be examined in its entirety in view of prior art. However, the rejections do not establish obviousness based on prior art. Therefore, the first element of the test is not met.

(2) The second element is to determine the differences between the scope and content of the patent claim and prior art.

In this case, the only possible analysis must be limited to prior art because there is no prior patent and there never can be a prior patent. There is no evidence in the record that such an analysis was ever undertaken. Indeed it is asserted that to the extent this analysis is to be attempted, it can only rely on prior art such as Day and Dalebout. Claim 1 as amended now clearly is not taught or suggested by those references. Similarly those references clearly do not teach or suggest the combination of each of the other cited and asserted potential applications that will conflict.

(3) The third element requires a determination of the level of ordinary skill in the art. There is no affirmative statements that identify what is the level of ordinary skill.

Certainly inventors and patents reflect extraordinary skill and not ordinary skill. Thus reference to prior patented combinations such as Dalebout or Dalebout '776 does not reveal even indirectly what the ordinary level of skill is or is asserted to be. If there is to be a basis to assert that certain combination claims which are in effect ABCX are obvious advancements over ABC, one must focus on the ordinary and not extraordinary skill and establish by some factually supported premise what the skill level is of that theoretical person. The record does not show any evidence to this effect.

(4) The fourth element requires evaluation of any objective indication of copying. In this case, none has been offered. That is, applicant has not offered evidence of commercial success or the like.

MPEP § 804 also requires a clear presentation of the differences and the reasons why one of ordinary skill would conclude that the combinations are obvious variations. Applicants assert that the offered explanations do not provide a clear presentation on their face and because they focus on one element and the claimed structure as a whole. Also, the level of skill in the art is never explained or defined.

Given these deficiencies, brief statements are made to which applicant responds as follows:

a. '794 Application: The fact that some commercial treadmills have had and now have handles on them does not make such use conventional, to the extent that conventional would imply widespread and common. Indeed the existence of the Dalebout '776 patent would suggest that such are novel and that use of handles on treadmills in the industry may reflect commercial success of the CROSS WALK treadmill sold by the assignee of applicants under the '776 patent. The novel combination of a treadmill as defined in the '794 application was not known in the art and could not be known in the art. In turn it cannot be obvious to make a treadmill combination that was simply not known. In turn the rejection based on the '794 application should be withdrawn.

b. '795 Application. The cover or underside pan is asserted to be conventional. There is no reference cited by the Examiner to support the assertion. Indeed Applicants have not been able to find any teaching of such structure in the prior art now of record. Absent some factual basis to support the assertion, the rejection based on the '795 Application is not proper and should be withdrawn.

c. '797 Application: The support structure of the claims of present application is asserted to read on the freestanding housing of claim 1 of the '797 application. Thus, the Patent Office focuses on one element rather than the claim as a whole. Further, the '797 application was filed on the same date as the present application and all patents granted would necessarily expire on the same date, it is not proper to use the specification of the '797 application in the manner asserted. In turn there is no legally cognizable factual basis asserted to support the rejection; and it should be withdrawn.

d. '798 Application. It is asserted that inclination structure is "conventional" in the art. Applicants recognize that treadmills in the art employ structures operable to vary the inclination of the tread upon which the user is supported. However the presence of inclination structure in the art does NOT make the combination claimed obvious. Focusing on one element is misleading and not dealing with the claim as a whole. The rejection is thus without proper foundation and it should be withdrawn.

e. '800 Application. The support structure of the claim 1 of the present application (which has been amended) is said to read on the freestanding housing of claim 1 of the '800 Application. As stated, the '800 application as a matter of law cannot be prior art and cannot form the basis for asserting obviousness.

f. '862 Application. Again inclination structure is asserted to be "conventional" in the art. As stated in d. next just above, treadmills in the art have inclination structure. However the presence of inclination structure in the art does not make the combination being claimed obvious. Absent some showing from the art dealing with the whole, claim the rejection is improper and should be withdrawn.

g. '271 Application. The rollers of claim 1 of the '271 application are said to be conventional. Presumably reference is made to rollers used for rolling the treadmill when the tread base is in the stored or second position. The assertion that such are conventional is to ignore all the other elements of claim 1 of the '271 application. The rejection has not presented any factual basis why rollers in combination as defined in the '271 claim 1 are obvious variations of the claimed invention of the present application. The rejection is thus without foundation and should be withdrawn.

Non Provisional Double Patenting

Claims 1-20 are also rejected (not provisionally) under the doctrine of double patenting (not obviousness-type) over the claims of the '793 Application, the '795 Application, the '798 Application, the '271 Application and serial number 08/593,802 (the '802 Application). The rejection is based on the assertion that all the applications are claiming common subject matter, namely a treadmill having support structure, a base with left and right sides, an endless belt. The treadmill is configured to be operable between a first operation position and a second storage position.

a. The '793 Application

In order to maintain a rejection for double patenting, the subject matter of the claim in one patent must be the same as the subject matter in another. In Re Longi, supra. The claims of the '793 patent all include "latching means" structure. None of the claims of this application have claims that recite "latching means" or any structure that may be regarded as comparable thereto. Accordingly the rejection is without foundation.

To the extent that claim 14 could have been the basis for this rejection, it is no longer in the case because it was earlier canceled. Even though applicants could incorporate the claim back into this case, the fact is that the subject matter of claim 14 is not in the case and there is no claim that could give rise to the rejection.

From another perspective, it is clear that one could easily construct devices that infringe the claims of this application but not the '793 application. In turn the infringement analysis suggested by MPEP § 804 Part II. A. reveals the absence of a basis for statutory double patenting. That is, the claims flatly are different.

To the extent that the rejection could be regarded as not avoided, it is traversed because it is wholly lacking in factual support from any of the language of any of the claims now in the case. The rejection should therefore be withdrawn to the extent it is premised on the '793 Application.

b. The '795 Application

Here again the inquiry must be whether the claims of the '795 Application are directed to the same subject matter as the claims now remaining in this case. None of the claims of the present application have any language directed to the pan or cover addressed in the '795 Application. In short the scope of the claims in the two cases is different. Structures that would infringe the claims of the present application would not necessarily infringe any of the claims of the '795 Application. Thus the claims are by definition different and not directed to the same subject matter. The rejection based on the '795 Application is therefore unsound; and it should be withdrawn.

c. '798 Application

The '798 Application has all claims directed to machines that include "inclination structure." No claim in the present application contains similar structure. Thus, it is possible for a machine to infringe the claims of the present application without infringing any

of the claims of the '798 Application. Therefore, the claims are directed to different subject matter. The rejection under the '798 Application is therefore without foundation and it should be withdrawn.

d. '802 Application

U.S. Application Serial 08/593,802 (herein the '802 Application) has claims that include structure to assist with or urge the lifting of the tread base from the first position to the second position. No claims of the present application define similar structure. In turn it can be seen that a machine may infringe claims of the present application and not claims of the '802 Application. In turn it is clear that the claims are drawn to different structure. The rejection to the extent it is based on the '802 Application is therefore without foundation; and it should be withdrawn.

e. '271 Application

All the claims of the '271 Application contain "roller" structure. None of the claims of the present application contain any structure that could be deemed to be comparable. In turn a machine could infringe the claims of the present application without infringing any claims of the '271 Application. In turn the claims are directed to different subject matter. The rejection is therefore improper; and it should be withdrawn.

f. No Common Subject Matter

In the Office Action at page 5, last paragraph, it is stated that the subject matter claimed in this application is fully disclosed in the referenced copending applications and "would be covered by any patent granted on that copending application since the reference copending application and the instant application are claiming common subject matter . . . " The common subject matter is asserted to be a "treadmill having a support structure, a tread base having right and left sides and an endless belt." The tread base is capable of movement between a first position and a second position.

From the above discussion, it can be seen that the cited applications and the present application do NOT CLAIM common subject matter. The disclosure is not of significance. The focus of all the cases and on the doctrine is on the claims. Since different machines can be structured that will infringe claims pending in this application and not any of the claims of any of the cited pending applications, the assertion of common subject matter is simply not supportable. Indeed, all of the claims advanced are combination claims. It is improper to

focus on one element of a combination claim as assert that it forms the basis for a rejection. The claims must be considered as as whole. In Re Schneller, 158 U.S.P.Q. 210, 215 (CCPA 1968)

It should also be noted that claim 1 as amended contains structural recitations that relate to the front of the treadmill that could be argued to dominate one or more of the cited copending applications. The new claims 21 and 22 also define machines that differ markedly from those defined by any of the claims of the cited applications and could be said to dominate. However, domination and double patenting should not be confused. General Foods Corp. v. Studiengesellschaft Kohle mbH, 23 U.S.P.Q. 2d 1839, 1843 (Fed. Cir. 1992) (see column 2, last paragraph or quote on page 1843) Claims of one patent dominating over another does not yield a double patenting rejection. Rather the claims as whole must be evaluated to determine if they are patentably distinct. *Id.* This must be done using prior art and not the applications themselves.

Inquiry is made why applicants did not present all these claims in one application. An answer is not necessary since each of the applications cited are directed to structurally different devices that are often asserted to be separate species.

35 U.S.C. § 112

a. Claims 4-14. Claims 4-14 stand rejected under 35 U.S.C. § 112 as indefinite because claim 4 recites that the tread base is above the base axis without specifying that such occurs only when the tread base in its second position. Claims 5-14 are rejected because they depend from a rejected claim.

Claim 4 has been canceled so that the rejection is avoided. To the extent that the limitations of claim 4 can now be found in claim 1 as amended, it should be noted that additional language has been employed to avoid this rejection. In turn claims 5-16 are allowable; and to the extent the same rejection would apply to claim 1 as now amended, the rejection has been avoided.

b. Claim 10-14. Claims 10-14 stand rejected under 35 U.S.C. § 112 because in claim 10 it is said that the right upright member cannot be spaced from itself. Applicants here seek to correct a grammatical error and avoid the rejection. The rejection of claim 10 and claims 11-14 depending therefrom is therefore deemed avoided.

c. Claims 16-20. Claims 16-20 stand rejected under 35 U.S.C. § 112 because it is unclear if the tread base or the user are to be in a first position. It is asserted that it is clear that the user is on the tread base only when the tread base is in its first position. Thus the rejection is regarded as unfounded. Be that as it may, applicants have now amended claim 16 to avoid the rejection. In turn the rejection of claim 16 and claims 17-20 are deemed avoided.

Claims 1-6 and 9-14 Obvious

Claims 1-6 and 9-14 stand rejected under 35 U.S.C. § 102 as obvious over Dalebout, et al. '396 (hereinafter referred to as Dalebout) in view of Day. Dalebout teaches construction of a treadmill with a base having fixed uprights.

Day teaches construction of a non motorized treadmill having rollers ostensibly covered or coated with rubber to function as rubber treads 20 (Page 1, Col. 2, lines 92-92). It does not show an endless belt of the type shown in Dalebout. Thus, Dalebout and Day teach different "tread" mechanisms. To make the asserted combination, one must reject the Day rollers and substitute the tread of Dalebout. Absent a teaching to do so, the substitution is hindsight effected because of applicants' teachings.

From another perspective, Dalebout has uprights that extend up from the base frame. An inclination system underlies the deck. Thus, to make the combination asserted, one must abandon the inclination system of Dalebout (which is the focus of the application) without any teaching in the art to do so.

Finally, Dalebout has a motorized tread with its inherent underlying heavy deck. One would need to totally reconfigure Day to accommodate the deck and motor with no teaching as how to do so. Thus, the combination of Dalebout and Day cannot be made and, as asserted, is improper.

Day also teaches handles 24 that are removably held to side bars 14 by pins 26 (Page 1, Col. 2, lines 104-108). For storage, Day first teaches one to release the side bars and allow them to swing free or fall into a storage position near the uprights 10 (Page 2, Col. 1, lines 37-41). The tread frame 13 is secured in its operating position by set screws 16 passing through bearings 15 to contact the support bar 12. In the storage position, the set screws 16 are loosened so that the free end of the tread frame 13 can be raised to a position

between the handle bars 27 (Page 2, Col. 1, lines 41-44). The tread frame 13 is held in its elevated position by the set screws 16.

Claim 1 as now amended specifies that the tread base have a mass with a center of gravity. Claim 1 further specifies that the center of gravity be positioned relative to the axis of rotation to stably support the tread base in the second position. Thus the center of gravity cannot be where it would be for the tread frame of Day. That is, the tread frame of Day appears spaced away from the bar 12 to cause the tread frame to free fall back to the support surface (absent some support). The structure of claim 1 as amended would not so function when the tread base is positioned in the second position. Thus Day simply does not teach or show the structure of claim 1 as now amended.

Turning to Fig. 2 of Day, it can be seen that the tread frame is in its stored configuration or position. By definition, the tread frame 13 is between the handles 27. It cannot be positioned over the support bar 12 because of handles 31 and the cross bar 30. Therefore the tread frame 13 obviously will fall back down if the user were to let go after raising the tread frame 13 to the position shown in Fig. 2. To preclude further movement, Day teaches one to employ the set screws 16 or any other suitable means for holding the tread frame in its elevated position. To the extent that the tread frame 13 can be said to have mass and in turn a center of gravity, as stated hereinbefore, it would presumably be displaced from the vertical above the bar 12 because the tread frame 13 cannot be moved over the bar 12 due to the interference of the cross bar 30. Thus a lever arm or a torque is available to urge the tread frame to rotate counterclockwise as can be seen in Fig. 2 of Day. Thus some kind of mechanical device is necessary to hold the tread frame up or in its storage position.

In comparison, the device of claim 1 as now amended has a mass and a center of gravity that is positioned relative to the axis of rotation so that a lever arm or a torque is developed to hold the tread base in the second or stored position. Thus the device as claimed is totally different because it does not require anything like the set screws 16 or other suitable structure to hold the device and sustain or retain it over the lever arm or torque that the mass of the tread frame 13 is developing (gravity acting through the center of gravity which is vertically spaced from the vertical over the bar 12) when in the stored configuration.

In turn combining Day with Dalebout does not yield the invention as now defined by claim 1 as amended. The combination does not suggest the invention of claim 1 as amended because it suggests only use of some kind of mechanical device like a set screw to affirmatively and mechanically secure the tread frame which would otherwise freely rotate back to the use position.

Claim 1 as now amended therefore clearly defines over the combination of Day and Dalebout. In turn the rejection has now been avoided.

Claim 2 is presumably rejected as obvious because Dalebout discloses an upright structure including left and right members. Even though Dalebout shows a left and right upright member, it is clear that Dalebout does not teach one to have a tread base that is rotatably attached to those uprights and movable relative to those uprights for storage.

Claim 2 is therefore not obvious. Further, claim 2 depends from claim 1 as now amended and which is now allowable.

Claim 3 is presumably rejected as obvious because Day is asserted by the Examiner to teach a tread base having a front portion extending from the said front to a position about midway between said front and the rear. Day does not teach construction of a front portion of a treadmill. Rather Day teaches one to position bearings 15 which do not comprise a front and in turn do not meet the language of claim 3. In turn claim 3 is allowable. Also claim 3 depends from claim 1 which is now allowable.

Claim 4 is rejected as obvious. Claim 4 has been canceled thereby avoiding the rejection. However it must be asserted that Dalebout does not teach construction of a tread base in which the center of gravity is above the base axis because Dalebout has no base axis as required by claim 1 as now amended.

Claim 5 is rejected as obvious as set forth with respect to claim 1 and further because it is asserted that Dalebout discloses a treadmill base with a front roller with a belt trained thereover and with torque means positioned between the base axis and the front. Dalebout has no base axis because the tread base of Dalebout does not rotate relative to the uprights. In turn claim 5 cannot be said to be obvious. Further claim 5 now depends from allowable claim 3 which in turn depends from allowable claim 1. Thus claim 5 is allowable.

Claim 6 is rejected because Dalebout discloses an electric motor. Even though Dalebout discloses an electric motor, Dalebout does not teach one to attach an electric motor

to a tread base that can be oriented from a use position to a storage position. In other words, there must be some reason to combine Dalebout's motor with Day. Since Day does not have an endless belt that can be driven by driving the front or drive pulley, Dalebout and Day together would not yield or suggest the claimed structure. Thus one would need to replace the multiple rollers of Day with a functioning endless belt driven by a motor. Some motivation to do so should be extant. There is none. In addition Claim 6 as presented now depends from other allowable claims and is thereby itself allowable.

Claim 9 is rejected as stated with respect to claim 1 and because the uprights of Dalebout are said to be capable of supporting the tread base in the second position and when moving between the second position and the first position. There is no teaching in Dalebout to this effect. Dalebout has a fixed relationship between the tread base and its uprights. It is not seen how there can be rotation between the tread base and the uprights when there is none taught, illustrated or otherwise suggested. Only Day offers a teaching that the tread frame can be rotated upright. Even Day does not describe or teach a footprint that yields a stable structure in the transition between the first and the second position as claimed. In other words, the rejection is made using the teachings of the applicant. There is nothing in either case that suggests the claimed arrangement. Claim 9 is therefore not obvious in view of Dalebout and Day. Further, claim 9 depends from what is allowable claims and in turn must be allowable.

Claim 10 is rejected as obvious for reasons stated as to claim 1. Claim 10 should be allowed because it depends from what are now allowable claim 1.

Claim 11 is rejected as obvious on the same grounds as Claim 1 and because Dalebout supposedly has the claimed structure. More specifically the left and right foot supports are said to have a front support (60) and a rear support member (116). Claim 11 defines a left and right forward foot with front and rear cross members extending between them. Dalebout does not disclose such structure. The frame 12 has a cross bar 116 as described at Col. 7, lines 25-26. The cross bar 116 as illustrated appears to be a "front." It is not attached to the feet but rather is attached to the side members of the frame. In turn Dalebout without more cannot teach the claimed structure. Further claim 11 depends from what are otherwise allowable claims and in turn is now allowable.

Claims 12 and 13 are rejected as obvious apparently for reasons stated with respect to claim 1 and further because the elements recited are assertedly present in Dalebout. Claims 12 and 13 depend from allowable claims and in turn are themselves allowable. Due to the amendments to claim 1, the rejection as presented is deemed avoided.

Claim 14 was earlier canceled as a result of a restriction requirement or an election requirement to select a species. Apparently the election crossed in the mail with the present Office Action in which claim 14 was examined and the election/species requirement was withdrawn. The examiner has indicated that the subject matter of claim 14 could be reintroduced by a Communication dated July 18, 1996. However applicants have here elected to not reintroduce the subject matter of claim 14 at this time.

Claims 7 and 8 Obvious

Claims 7 and 8 stand rejected under 35 U.S.C. § 103 as obvious over Dalebout in view of Day as applied hereinbefore and further in view of Wanzer et al. (hereinafter Wanzer). Claim 7 as here presented further defines the torque means as a flywheel such as that disclosed and discussed with respect to Fig. 14. Wanzer shows a separate flywheel but does not teach anyone to position the flywheel relative to the axis of rotation of a movable tread base or to otherwise construct a treadmill with a tread base that rotates relative to uprights. In turn Wanzer separately and with Dalebout and Day cannot yield the inventions of claims 7 and 8 and do not suggest those inventions. Further, claims 7 and 8 depend from now allowable claim 1 and in turn are allowable.

Claims 15-20 Obvious

Claims 15-20 stand rejected under 35 U.S.C. § 103 as obvious over Dalebout in view of Day and also in view of Dalebout '776. Claims 15 -20 depend from what is now allowable claim 1. In turn claims 15-20 are allowable. Further it should be noted that Dalebout '776 does not disclose a treadmill with a tread base movable relative to an upright and with the tread base configured to position the center of gravity as defined in claim 1. Thus Dalebout '776 does not supply any of the deficiencies of Day and Dalebout.

Claim 21

Applicants here present claim 21 which is claim 1 as originally presented with additional limitations defining a tread base which has a portion that acts as a cantilever. Neither Day nor Dalebout separately or together teach or suggest structure that

counterbalances and facilitates the lifting of the tread base from the use position to the stored position. Therefore, claim 21 as presented is allowable over the art as applied to claim 1.

Claim 22

Claim 22 as presented defines a treadmill that has two movable handles as well as a separate fixed handle structure. None of the applied references teach or suggest the use of fixed handles in combination with movable handles on a treadmill that has a base that is rotatable between a stored and a use configuration. The CROSSWALK ADVANTAGE submitted with a supplemental disclosure statement shows a treadmill with non movable tread base and with fixed and moveable handles. However, there is no teaching to combine such into a machine in which the tread base rotates as defined. Thus, the combination of claim 22 is not taught in the art.

Additional Reference

Applicants are submitting a second supplemental information statement in order to present an owner's manual for the CROSS WALK ADVANTAGE treadmill with handles. The treadmill was advertised commercially by the assignee of this application.

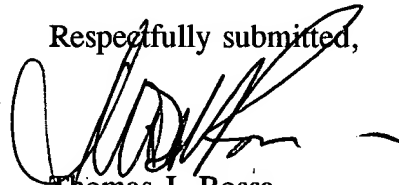
Summary

Applicants here have amended claim 1 to clearly define over the art separately presented or as combined. In turn early action and allowance is requested.

If any additional fees are required in association with this Amendment in addition to those included, they may be charged to deposit account 20-1469.

If there are any questions or concerns, inquiry should be directed to the undersigned counsel at 801 532 1922 so that processing of this case can be expedited.

Respectfully submitted,



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